STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL LATIF BIGGS,

Defendant-Appellant.

UNPUBLISHED
August 10, 1999

No. 202783
Recorder's Court
LC No. 90-004611

Before: Doctoroff, P.J., and McDonald and Wilder, JJ.

PER CURIAM.

Defendant was charged with six counts of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was tried with codefendants Mark Bell[1] and Tamara Marie Marshall[2] before three separate juries. Defendant was convicted of one count of first-degree felony murder (based on armed robbery) for the death of Levon Robinson, five counts of second-degree murder, MCL 750.317; MSA 28.549, for the deaths of Bobby Frazier, Carl Williams, Robert Hill, Steve Owens, and Rodney Lewis, and one count of felony firearm. He was sentenced to natural life in prison for the first-degree felony murder conviction, sixty to ninety years in prison for each of the five second-degree murder convictions and two years in prison for the felony firearm conviction. He appeals by leave granted. We affirm.

Defendant first argues that the trial court erred in admitting his police statement because the statement was involuntary. We disagree. When reviewing a trial court's decision with respect to whether a defendant voluntarily, knowingly and intelligently waived his *Miranda* rights, this Court must review the entire record de novo, but will not disturb the trial court's factual findings unless they are clearly erroneous. *People v Sexton,* 458 Mich 43, 68; 580 NW2d 404 (1998); *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996)(Boyle, J). Clear error will not be found where this Court merely disagrees with the result reached by the factfinder, but exists only where "the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lombardo,* 216 Mich App 500, 504; 549 NW2d 596 (1996). When reviewing a trial court's findings regarding the voluntariness of a statement, this Court must recognize the trial court's superior ability to view the

evidence, and must give deference to the trial court's findings. *People v Etheridge,* 196 Mich App 43, 57; 492 NW2d 490 (1992).

Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Garwood,* 205 Mich App 553, 555-556; 517 NW2d 843 (1994). The prosecutor has the burden of proving that the suspect properly waived his rights. *Cheatham, supra* at 27. Whether a waiver of *Miranda* rights was voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. *People v Howard,* 226 Mich App 528, 538; 575 NW2d 16 (1997). Here, defendant testified that he understood the *Miranda* rights. Thus, the only question was whether defendant's waiver was voluntary. The voluntariness of a statement is determined solely by examining police conduct. *Id.* at 538.

After having reviewed the record, we conclude that the trial court did not clearly err in finding that defendant's statement was voluntary. Evidence indicated that defendant was read his *Miranda* rights immediately before he gave his statement. Defendant testified that he had two prior police contacts and that he understood the *Miranda* rights. While there was conflicting testimony regarding police conduct, the trial court found that the testimony of the police witnesses was more credible than that of defendant, and this Court must give deference to that finding. *Etheridge, supra*. There was substantial evidence to support the trial court's findings that defendant was not deprived of food or sleep, and that he was not physically abused. Thus, we cannot conclude that the trial court clearly erred in finding that defendant's statement was voluntary.

Defendant next argues that the trial court erred in denying his motion to change venue due to voluminous and prejudicial pretrial publicity. We disagree.[3] A trial court's decision regarding a motion to change venue will not be reversed on appeal absent a palpable abuse of discretion. *People v Jendrzejewski,* 455 Mich 495, 500; 566 NW2d 530 (1997).

Generally, a defendant must be tried in the county where the crime was committed. MCL 600.8312; MSA 27A.8312; *Jendrzejewski, supra* at 499. However, venue may be changed to another county in special circumstances where the interests of justice demand the change or a statute provides for the change. *Jendrzejewski, supra* at 499. The interests of justice demand a change of venue "where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted," or where "community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Id.* at 500-501. The fact that jurors have been exposed to newspaper accounts of the crime does not, by itself, establish a presumption that pretrial publicity has denied a defendant a fair trial. *Id.* at 502. Rather, the totality of the circumstances must be reviewed to determine if the defendant's trial was fundamentally unfair. *Id.*

It is undisputed that there was extensive media coverage in the instant case. However, after having reviewed the newspaper articles submitted by defendant, we cannot conclude that the media coverage denied defendant a fair trial. Many of the articles contain statements of witnesses and extensive descriptions of the crime. Nevertheless,

> the content of the pretrial publicity in this case does not reflect extensive egregious media reporting of a confession made without the assistance of counsel, *Rideau v Louisiana*, 373 US 723, 727; 83 S Ct 1417; 10 L Ed 2d 663 (1963), a barrage of inflammatory publicity leading to a "pattern of deep and bitter prejudice" against the defendant, *Irvin, supra* at 727, or a carnival-like atmosphere surrounding the proceedings. Nor was there the kind of highly inflammatory attention to sensational details that occurred in *DeLisle* and *Tyburski*. [*Id.* at 507-508.]

Thus, we are convinced that the pretrial publicity did not deny defendant a fair trial, and that the trial court did not abuse its discretion in denying defendant's motion to change venue.

Defendant next argues that the trial judge failed to adequately question the jurors so that challenges for cause and peremptory challenges could be exercised intelligently. However, defendant failed to object to the court's voir dire method at trial and, thus, has waived this issue on appeal. *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998); *People v Wimbley*, 108 Mich App 527, 535; 310 NW2d 449 (1981). Furthermore, after having reviewed the voir dire transcript, we cannot conclude that the trial court's voir dire constituted an abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994) (Mallett, J). The trial court inquired into which jurors had been exposed to pretrial publicity. It then called upon such jurors, who indicated the extent of their exposure, and asked whether the exposure would affect the juror's ability to decide the case fairly and impartially. Jurors who indicated that they could not be fair or impartial were excused for cause. Accordingly, defendant is not entitled to reversal on the basis of this issue.

Next, defendant contends that the trial court erred when it denied a challenge for cause with respect to juror Satwicz. We disagree. Reversal is required only where 1) the court improperly denied a challenge for cause, 2) the aggrieved party exhausted all peremptory challenges, 3) the aggrieved party demonstrated the desire to excuse another subsequently summoned juror, and 4) the juror whom the party wished later to excuse was objectionable. *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).

Here, defendant has not shown that the trial court improperly denied his challenge for cause with respect to juror Satwicz. Defendant challenged Satwicz for cause on the basis of her statement that a close friend of hers had been murdered in Detroit two years before defendant's trial, and that the perpetrator was never apprehended. Upon further questioning by the trial court, Satwicz insisted that her friend's murder would not affect her ability to be an impartial juror in the instant case. Defendant has not demonstrated that Satwicz had a state of mind that would prevent her from rendering a just verdict or that she had formed an opinion on the facts of the case, MCR 2.511(D)(4), or any other reason that would support the granting of a challenge for cause under MCR 2.511(D). Thus, we are not convinced that the trial court erred in denying defendant's challenge for cause with respect to Satwicz.

Defendant further argues that the trial court erred in denying his motion for relief from judgment or a new trial on the basis that Satwicz admitted that, while the jury was deliberating, she saw a newspaper headline stating that codefendant Bell had been found guilty. We disagree. Whether a

defendant was prejudiced by a juror's exposure to media coverage "must turn on the special facts of each case, and the question is left largely to the determination and discretion of the trial court." *People v Grove,* 455 Mich 439, 472; 566 NW2d 547 (1997). "'[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising position.'" *Id.*, quoting *Smith v Phillips,* 455 US 209, 217; 102 S Ct 940; 71 L Ed 2d 78 (1982).

Here, Satwicz testified that, while she read the headline, she did not read the accompanying newspaper article. Satwicz further testified that she never discussed the headline with the other jurors and that the headline did not affect her decision regarding defendant's guilt. Under these circumstances, we cannot conclude that the trial court abused its discretion in determining that defendant was not prejudiced by Satwicz's exposure to the newspaper headline or in denying defendant's motion for relief from judgment or a new trial. *Grove, supra.*

Defendant next argues that the trial court erred in admitting Hijuno Watson's testimony regarding the death of defendant's brother, Arlatan Biggs. We disagree. Generally, this Court reviews a trial court's decision regarding the admission of evidence for an abuse of discretion. *Howard, supra* at 551. Here, defendant failed to object at trial to the challenged testimony. Absent an objection, this Court may take notice of plain errors affecting substantial rights. MRE 103(d).

Defendant asserts that Watson's testimony regarding Arlatan Biggs' death was inadmissible because it was not relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In addition, evidence not directly related to a consequential fact may be admitted to establish background information to "aid the court or jury in determining the probative value of other evidence offered to affect the probability of the existence of a consequential fact." *People v Beckley,* 434 Mich 691, 736; 456 NW2d 391 (1990)(Boyle, J, concurring), citing 1 Weinstein & Berger, Evidence, ¶401[05], pp 401-429. Once the subject of Arlatan's death was raised by defense counsel, the jury was entitled to the full picture. Although the evidence was somewhat prejudicial, its probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403. Thus, we find no plain error affecting defendant's substantial rights.

Defendant next argues that he was denied a fair trial by erroneous jury instructions. We disagree. A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Daoust,* 228 Mich App 1, 14; 577 NW2d 179 (1998). Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Daoust, supra.* Here, defendant did not object at trial to the instructions he now claims as error. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. *People v Swint,* 225 Mich App 353, 376; 572 NW2d 666 (1997).

Defendant first argues that the felony murder instruction erroneously informed the jury that a finding that defendant intended to kill any one of the victims was sufficient to find that defendant committed felony murder with respect to all of the victims. However, the jury was instructed that defendant was charged with six counts of felony murder, that each count must be considered separately,

and that each element of each crime must be proven beyond a reasonable doubt. Thus, when the jury instructions are read as a whole, *Daoust, supra* at 14, the jury was not left with the impression that the intent to kill one of the victims could be transferred to the other five victims.

Contrary to defendant's argument, the felony murder instructions did not violate *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980). According to *Aaron*, to establish the crime of first-degree felony murder, the prosecution must prove that the defendant acted with malice in causing the death of another. *Id.* at 728. Malice is defined as the intent to kill, the intent to do great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The intent to commit the underlying felony, without malice, is not sufficient to establish felony murder. *Aaron, supra*. Here, the trial court instructed the jury that to find defendant guilty of felony murder, it was required to find that he had the intent to kill, the intent to cause great bodily harm, or the intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result of his act. Thus, the jury was properly instructed that it was required to find that defendant acted with malice in order to find him guilty of felony murder. *Id.*

Defendant next argues that the aiding and abetting instructions were erroneous because they did not sufficiently instruct the jury regarding the intent required for aiding and abetting a felony murder. After having reviewed the aiding and abetting instructions, we find no error. The instructions properly informed the jury that it must find that defendant had the intent to commit felony murder to find him guilty of aiding and abetting felony murder.

Defendant also asserts that the court's second-degree murder instruction was erroneous because it did not adequately describe the offense and did not comply with the Michigan Criminal Jury Instructions. We first note that the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court and, therefore, their use is not required. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Furthermore, the court's statement of the law regarding second-degree murder was accurate and the instruction fairly presented the offense to the jury. *Daoust, supra; Swint, supra*. Thus, we conclude that manifest injustice did not result from the jury instructions.

Next, defendant contends that his second-degree murder convictions and his first-degree felony murder conviction were not supported by sufficient evidence. We disagree. When reviewing a challenge to the sufficiency of the evidence, this Court examines the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

First, there was sufficient evidence to support a finding that defendant was guilty beyond a reasonable doubt of second-degree murder on the basis of the theory that he aided and abetted the commission of the five murders by Mark Bell and/or Tamara Marshall. To sustain a conviction for second-degree murder, the prosecution must establish 1) a death, 2) caused by an act of the defendant, 3) with malice, and 4) without justification. *Goecke, supra* at 464-465. To establish aiding and abetting, the prosecution must show that 1) the crime charged was committed by the defendant or some

other person, 2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and 3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

Here, there was evidence that defendant stood holding a gun pointed at the occupants of the house who were lined up against the dining room wall. Either defendant or codefendant Bell demanded guns and money from the men lined up against the wall. Either defendant or Bell went with Frazier to find guns and money, while the other (defendant or Bell) stayed to guard the men in the dining room. Further evidence indicated that defendant searched the house for guns and money. Defendant was present in the house when Marshall yelled up the stairs that Owens had to be killed because he knew too much about them.

When viewed in the light most favorable to the prosecution, it is clear that the foregoing evidence was sufficient to support a finding that defendant was guilty beyond a reasonable doubt of aiding and abetting second-degree murder. The evidence indicated that defendant was armed and was helping Marshall and Bell throughout the night. Considering the evidence that Bell and Marshall were armed, and that Marshall stated that Owens had to be killed, the evidence was sufficient to support a finding that defendant had the intent to kill the victims or that he knew that Bell and Marshall had the intent to kill the victims. We conclude that the evidence was sufficient to support the jury's finding that defendant was guilty beyond a reasonable doubt of five-counts of second-degree murder.

The prosecution also presented sufficient evidence to support defendant's conviction for first-degree felony murder. To sustain a conviction of first-degree felony murder, the prosecutor must show 1) the killing of a human being, 2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, and 3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316; MSA 28.548. *People v Kelly*, 231 Mich 627, 642-643; 588 NW2d 480 (1998). It is not necessary that the murder be contemporaneous with the felony, but the defendant must have intended to commit the underlying felony at the time the homicide occurred. *Id.* at 643. Defendant's felony murder charge was based on armed robbery. The elements of armed robbery are 1) an assault, 2) a felonious taking of property from the victim's person or presence, and 3) while armed with a weapon described in the statute. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996).

The evidence noted above in support of defendant's second-degree murder convictions was sufficient to establish that defendant committed or was attempting to commit an armed robbery. In addition, when viewed in the light most favorable to the prosecution, LaCraig Reeves' testimony that defendant searched him when he entered the house also indicates that defendant intended to rob Reeves. Furthermore, there was evidence that defendant intended to kill Levon Robinson. LaCraig Reeves testified that when he entered the house with Levon Robinson, Bell walked downstairs and pointed a gun at them. Bell searched Robinson and took money from him. Defendant searched LaCraig Reeves, but found nothing. Reeves was ordered to lie on the floor, but he heard defendant walk Robinson down into the basement. He then heard Bell walk down into the basement, and heard a

gunshot coming from the basement. Reeves heard footsteps coming up the basement stairs and going out the front door. Reeves then got up and ran out the front door where he encountered defendant. Reeves pushed defendant and ran off. When viewed in the light most favorable to the prosecution, the evidence was sufficient to support defendant's first-degree murder conviction for the death of Levon Robinson either as a principal or, in light of Reeves' testimony that Bell was also in the basement when he heard the gunshot, as an aider and abettor.

Defendant next argues that he was denied a fair trial by prosecutorial misconduct. We disagree. The test for prosecutorial misconduct is whether the prosecutor's conduct denied the defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The reviewing court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.* Here, defendant failed to object to many of the remarks he claims as error on appeal. Our review of the allegations of error to which defendant did not object is foreclosed unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first argues that he was denied a fair trial because the prosecutor elicited false testimony from James Eskew. A prosecutor's knowing presentation of false testimony may constitute grounds for reversal. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Here, there are several inconsistencies between Eskew's police statement and his trial testimony. However, there is no evidence that the prosecutor knowingly presented perjured testimony, that the prosecutor attempted to conceal the inconsistencies, or that the prosecutor attempted to keep the contents of Eskew's police statement from defendant. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Furthermore, defense counsel was free to impeach Eskew's credibility with the prior statements and conducted an effective cross-examination of Eskew regarding the inconsistencies. Thus, defendant has not shown that the prosecutor committed misconduct by knowingly presenting perjured testimony. *Id.*

Defendant next asserts that he was denied a fair trial because the prosecutor improperly questioned Hijuno Watson regarding the unrelated armed robbery during which Arlatan Biggs died. Defendant asserts that the prosecutor's questioning was outside the scope of direct examination, that the testimony the questioning was designed to elicit was irrelevant, and that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. However, as we discussed above, the prosecutor's questioning, to which defendant did not object, was not improper and did not deny defendant a fair trial. Thus, the questioning did not constitute prosecutorial misconduct. Furthermore, any prejudice resulting from the prosecutor's reference to Watson's testimony regarding the unrelated armed robbery during closing arguments could have been cured by an appropriate instruction had defendant object at trial. *Stanaway, supra.* In addition, considering the weight of the evidence of defendant's guilt, the prosecutor's remarks did not result in a miscarriage of justice. *Id.*

Next, defendant argues that he was denied a fair trial because certain arguments and remarks of the prosecutor constituted a personal attack on defendant, defense counsel, and the defense theory. However, after having carefully reviewed the challenged remarks in context, we conclude that the remarks were not improper. Contrary to defendant's arguments, the remarks did not amount to a

personal attack on the credibility of defendant or defense counsel, and did not indicate that defense counsel intentionally was trying the mislead the jury. Cf. *People v Dalessandro*, 165 Mich App 569, 579-580; 419 NW2d 609 (1988). The comments to which defendant refers were made during an evaluation of the evidence by the prosecutor and were based on the prosecutor's view of the evidence. A prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsberry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Furthermore, any prejudice resulting from the statements could have been cured by an appropriate instruction had defendant objected at trial, and failure to further review this issue will not result in a miscarriage of justice. *Stanaway, supra.*

Defendant next argues that the prosecutor improperly appealed to the sympathy of the jurors when questioning Zamela Lewis and Albert Hill, relatives of two of the victims. Defendant further asserts that the testimony was irrelevant. Despite two requests by this Court for the complete record of the trial court proceedings, defendant has not provided this Court with the transcript of the testimony of Zamela Lewis and Albert Hill, as is required by MCR 7.210(B)(1)(a). Thus, he has waived this issue on appeal. *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992).

Defendant also contends that the prosecutor improperly appealed to the sympathy of the jurors when he described the manner in which Levon Robinson was shot during closing arguments. However, the prosecutor's argument was not improper. A prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence as they relate to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor's argument was based on Dr. Bader Cassin's testimony regarding the nature of Robinson's gunshot wound and was relevant to proving that defendant acted with the intent to kill.

Next, defendant asserts that he was denied a fair trial because the prosecutor misstated Sergeant McGruther's testimony when he argued that the gun used to kill Robinson was a revolver rather than a semi-automatic. Defendant testified that, on the night of the murder, he did not know the type of revolver he was carrying. However, he testified that he later hid the revolver at his home, and when his home was searched by the police, the weapon was found and was identified as a .32 caliber revolver. When Sergeant McGruther was asked whether the .357 caliber bullet that killed Robinson had to have come from a revolver rather than a semi-automatic weapon, he stated, "Not really. There are semi-automatics that are chambered to fire .357 Magnum. They will fire these." Despite McGruther's testimony that the .357 bullet could have come from a semi-automatic weapon, the prosecutor was free to relate McGruther's testimony to his theory of the case by arguing that the bullet that killed Robinson came from a revolver. *Bahoda, supra* at 282. The prosecutor's argument was based on McGruther's testimony and was not improper.

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Stanaway, supra at 687-688. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 687.

Defendant asserts that he was denied the effective assistance of counsel because defense counsel 1) failed to object to the prosecutor's appeal to the sympathy of the jurors during his closing argument, 2) failed to object to the prosecutor's use of James Eskew's false testimony, 3) failed to object to the court's felony murder, second-degree murder, and aiding and abetting instructions, and 4) failed to object to the prosecutor's misstatement of Sergeant McGruther's testimony. However, because we have concluded that 1) the prosecutor's closing argument was proper and did not appeal to the sympathy of the jurors, 2) defendant failed to show that the prosecutor knowingly used perjured testimony, 3) the jury instructions were proper, and 4) the prosecutor did not misstate McGruther's testimony, defense counsel's failure to object did not constitute ineffective assistance of counsel.

Defendant further asserts that he was denied the effective assistance of counsel because defense counsel erroneously argued to the jury that Robinson was shot with a .357 revolver. During his closing argument, defense counsel stated, "First we know that the person in the basement, Levon Robinson, was shot was [sic] what the ballistic person said was a .357 revolver." Defense counsel's statement was not a mischaracterization of McGruther's testimony. McGruther initially testified that the .357 bullet that killed Robinson was fired from a .357 Magnum. When asked whether the bullet must have come from such a revolver, he conceded that it was possible for a .357 bullet to be fired from a semi-automatic weapon if the weapon was "chambered to fire .357 Magnum. . . . The only thing I can tell you is that the weapon in all probability had a long barrel."

Where the jury very well may have inferred from McGruther's testimony that Robinson was killed with a revolver, defendant has not overcome the presumption that defense counsel used sound trial strategy by conceding that the bullet that killed Robinson was most likely fired from a revolver, but arguing that defendant's .32 caliber revolver had a short barrel and, thus, could not have fired a .357 bullet. *Stanaway, supra* at 687. Furthermore, defendant failed to demonstrate that the result of the proceedings would have been different had defense counsel not stated that McGruther testified that Robinson was killed with a .357 revolver. *Id.* Thus, we conclude that defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Gary R. McDonald
/s/ Kurtis T. Wilder

[1] Mark Bell was convicted of six counts of first-degree felony murder.
[2] Tamara Marie Marshall was convicted of three counts of first-degree felony murder, two counts of second-degree murder, one count of being an accessory after the fact, and one count of felony firearm.
[3] On appeal, the prosecution asserts that the law of the case doctrine applies to certain issues raised by defendant, such as the pretrial publicity issues and the jury instruction issues. The law of the case doctrine provides that an appellate court's decision regarding an issue is binding on courts of equal or

subordinate jurisdiction during subsequent proceedings in the same case. *People v Herrera, (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). The law of the case doctrine does not apply here because the decisions of this Court to which the prosecution refers were not made in the instant case, but were made in appeals brought by codefendants Bell and Marshall, who were tried before different juries. Certain factors, such as pretrial publicity and jury instructions, could have been prejudicial with respect to defendant, but not with respect to codefendants. Thus, the prosecution's reliance on the law of the case doctrine is without merit.